

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

**COMMENTS of PIONEER CELLULAR and
UNITED STATES CELLULAR CORPORATION
on
UNITED STATES TELECOM ASSOCIATION
PETITION FOR RECONSIDERATION AND CLARIFICATION**

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SUMMARY

The Joint Commenters strongly support the petition for reconsideration and clarification filed by the United States Telecom Association, which draws attention to numerous substantial deficiencies and ambiguities in a *Further Guidance Public Notice* released in July by the Office of Native Affairs and Policy (in coordination with the Wireless Telecommunications Bureau and the Wireline Competition Bureau). The *Further Guidance* addresses the Tribal government engagement provisions of the Connect America Fund.

The Joint Commenters agree with USTelecom that the Tribal engagement provisions contained in the *Further Guidance* should apply only in certain circumstances. Specifically, the provisions of the *Further Guidance* should not apply to eligible telecommunications carriers if their existing universal service support is being phased out pursuant to the terms of the *Connect America Fund Order*, and also should apply prospectively only to ETCs that receive CAF or Mobility Fund support that is specifically targeted for use in deploying networks and providing services on Tribal lands.

Many competitive ETCs may receive substantially reduced levels of support (or no support at all) as a result of decisions made in the *CAF Order*. In such circumstances, the rationale for requiring these carriers to engage with Tribal governments would no longer apply, since carriers whose current funding is being eliminated, and whose receipt of new CAF or Mobility Fund support is uncertain, would not be able to discuss any plans for deployment of networks and the provision of services on Tribal lands. For these reasons the Joint Commenters agree with USTelecom's opposition to imposing the *Further Guidance* obligations on these carriers.

An additional deficiency of the *Further Guidance* is that there needs to be a balancing of the benefits of the Tribal government engagement obligations with the costs that these obliga-

tions would impose on ETCs. These costs will be considerable, especially for ETCs that operate in numerous Tribal jurisdictions. To take one example, the requirement that carriers must send executives with decision-making authority to attend face-to-face meetings with potentially dozens of Tribal government representatives could, as USTelecom explains, force carriers to dedicate a senior executive and supporting staff to do “little else but travel[] from Tribal community to Tribal community” to engage with Tribal representatives.

A principal ambiguity generated by the *Further Guidance* is its lack of clarity regarding whether its various provisions relating to ETCs are meant to be requirements or are instead intended to serve as aspirational goals. The distinction is important, since carriers failing to comply with any *Further Guidance* requirements would face financial consequences, including a potential reduction in their universal service support. The Joint Commenters urge the Commission to resolve this ambiguity by clarifying that the *Further Guidance* seeks to promote flexible, voluntary engagement efforts, and not to impose rigid requirements on ETCs.

Finally, the Joint Commenters also agree with and support several additional arguments presented by USTelecom in its petition, including arguments that (1) if the *Further Guidance* intended to impose substantive obligations it must be reconsidered because the obligations were adopted without notice and comment, in violation of the Administrative Procedure Act; (2) certain requirements in the *Further Guidance* impair First Amendment rights by impermissibly compelling speech by ETCs; and (3) the *Further Guidance* fails to comply with the Paperwork Reduction Act.

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on
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PETITION FOR RECONSIDERATION AND CLARIFICATION**

Cellular Network Partnership, a Limited Partnership d/b/a Pioneer Cellular (“Pioneer Cellular”), and United States Cellular Corporation (“U.S. Cellular”) (collectively, the “Joint Commenters”), by counsel, and pursuant to the Public Notice released August 27, 2012, by the Office of Native Affairs and Policy (“ONAP”), in coordination with the Wireless Telecommuni-

cations Bureau and the Wireline Competition Bureau (collectively, the “Bureaus”),¹ hereby submit these Comments on the Petition for Reconsideration and Clarification filed by the United States Telecom Association (“USTelecom”) on August 20, 2012.²

Pioneer Cellular is a partnership group comprised of Pioneer Telephone Cooperative, Inc., KanOkla Telephone Association, South Central Communications of Kansas, and Hinton Cellular Company in Hinton, Oklahoma. Established in 1988, the group serves customers in 37 counties in western and southwestern Oklahoma and 14 counties in southern Kansas. Pioneer Cellular currently provides services utilizing 4G LTE and 3G EVDO Rev. A platforms.

U.S. Cellular provides cellular services and Personal Communications Service in 44 Metropolitan Statistical Areas, 100 Rural Service Areas, one Major Trading Area, and numerous Basic Trading Areas throughout the Nation. U.S. Cellular’s subsidiaries and affiliates have received eligible telecommunications carrier (“ETC”) status and are currently receiving federal high-cost support in Illinois, Iowa, Kansas, Maine, Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Tennessee, Virginia, Washington, West Virginia, and Wisconsin.

The Joint Commenters have been actively engaged in utilizing Universal Service Fund (“USF”) support to deploy mobile voice and broadband networks throughout their designated service areas, which include Tribal lands.

¹ *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Seek Comment on the United States Telecom Association Petition for Reconsideration and Clarification of the Further Guidance Regarding the Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, DA 12-1405 (rel. Aug. 27, 2012).

² *Petition for Reconsideration and Clarification of the United States Telecom Association*, WC Docket No. 10-90 *et al.*, filed Aug. 20, 2012 (“Petition”).

I. INTRODUCTION.

Pursuant to authority delegated by the Commission in the *CAF Order*,³ ONAP, in coordination with the Bureaus, released a Public Notice on July 19, 2012, providing further guidance on the Tribal engagement obligation adopted in the *CAF Order*.⁴ The *Further Guidance Public Notice* is “intended to facilitate the required discussions” between Tribal government officials and certain communications providers.⁵

The Petition filed by US Telecom convincingly demonstrates that the *Further Guidance Public Notice* contains numerous procedural and legal deficiencies that require prompt attention and correction, and that the *Further Guidance* has generated numerous ambiguities and uncertainties that warrant immediate clarification.⁶ Although the Joint Commenters agree with and

³ *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17869 (para. 637) (2011) (“*CAF Order*”), *pets. for review pending sub nom. Direct Commc’ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases).

⁴ Office of Native Affairs And Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund, Public Notice, 27 FCC Rcd 8176 (ONAP 2012) (“*Further Guidance Public Notice*” or “*Further Guidance*”).

⁵ *Id.* at 8176 (para. 1).

⁶ USTelecom also filed an earlier petition asking the Commission, *inter alia*, to reconsider its Tribal engagement rules. See USTelecom, Petition for Reconsideration, WC Docket No. 10-90 *et al.*, filed Dec. 29, 2011) (“USTelecom First Reconsideration Petition”). Although the Joint Commenters, in these Comments, limit their discussion to issues raised by USTelecom in its Petition concerning the *Further Guidance Public Notice*, the Joint Commenters agree with USTelecom that a legal cloud continues to hang over the Commission’s Tribal engagement rules, Petition at 2, and therefore urge the Commission to resolve the challenges to its rules “that dictate that [ETCs] must engage and how they must engage with Tribal governments.” *Id.* (footnote omitted).

support virtually all the arguments advanced by USTelecom in its Petition,⁷ they will focus these Comments on two issues raised by USTelecom that have a particular bearing on the impact that the *Further Guidance* would have on the Joint Commenters and similarly situated competitive ETCs.

⁷ Specifically, the Joint Commenters support USTelecom’s argument that, if any of the provisions of the *Further Guidance Public Notice* are intended to impose substantive obligations on ETCs, then the *Further Guidance* must be reconsidered because these obligations were adopted without any notice and comment, in violation of the Administrative Procedure Act (“APA”). USTelecom observes that the *Further Guidance* enumerates “a litany of activities in which an ETC ‘should’ engage for each Tribal area it serves,” Petition at 6, but that “[w]hether these activities are binding rules or aspirational goals is unclear.” *Id.* at 7 (footnote omitted). The Joint Commenters agree with USTelecom’s explanation that, if the *Further Guidance* was intended to impose mandatory duties and responsibilities on ETCs serving Tribal lands, then this action must be reconsidered because the Commission failed to comply with the notice-and-comment rulemaking requirements of the APA. *Id.* at 8.

In addition, the Joint Commenters agree with USTelecom’s concern that the *Further Guidance Public Notice* should be reconsidered because certain of its requirements impermissibly intrude upon First Amendment protections. In requiring that ETCs must “provide certain documents and share certain information” with Tribal government representatives, *id.* at 9, the *Further Guidance*, USTelecom explains, violates the First Amendment “right to refrain from speaking at all.” *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (internal quotation marks omitted)). The Joint Commenters agree with USTelecom that the *Further Guidance* compels speech, but fails to describe any harms that this forced speech would rectify, or how this rectification would be accomplished by the forced speech. *Id.* at 10.

Finally, USTelecom urges the Commission to reconsider or clarify the *Further Guidance Public Notice* because the *Further Guidance*, failed to comply with the requirements of the Paperwork Reduction Act (“PRA”). The Joint Commenters agree with USTelecom that ONAP failed to satisfy PRA procedures requiring that Federal agencies must seek public comment on proposed information collections, and must submit the proposed collections for review by the Office of Management and Budget. *Id.* at 14. The Joint Commenters join USTelecom in urging the Commission to reconsider or clarify the Tribal engagement obligations in the *Further Guidance* in light of the PRA violations enumerated by USTelecom.

The Joint Commenters also note that ONAP apparently has taken the position that PRA requirements apply only to the annual certification and reporting requirements imposed as part of the Tribal engagement provisions of the *CAF Order*. Thus, in response to a question recently raised regarding how the Tribal engagement requirements could receive PRA approval before the end of this year, “ONAP explained that the pending Paperwork Reduction Act approval applies only to the obligations for ETCs to report as to how they have fulfilled the Tribal engagement requirement; it does not impact their responsibility to conduct the engagement.” Ex Parte Letter from John Kuykendall, Vice President, John Staurulakis, Inc. (“JSI”), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (filed Sept. 10, 2012), at 3 (unpaginated) (“JSI Letter”). This position taken by ONAP is untenable. The Tribal engagement provisions require numerous disclosures to be made by ETCs to Tribal government representatives (*e.g.*, deployment planning, feasibility planning, marketing plans). As USTelecom explains, “information” covered by the PRA and subject to PRA requirements includes disclosures made to third parties. Petition at 14 & n.43.

II. THE TRIBAL ENGAGEMENT REQUIREMENTS SHOULD NOT APPLY TO ETCs IF THEIR USE SUPPORT IS BEING PHASED OUT OR IF THEY DO NOT RECEIVE SUPPORT TARGETED FOR TRIBAL AREAS.

One of the most difficult problems presented by the *Further Guidance Public Notice* is its failure to provide a rationale for its apparent decision to impose requirements on all communications providers, regardless of how these providers may be affected by the Commission's various universal service reforms. On its face, the *Further Guidance* applies its various obligations and responsibilities, without exception or qualification, to any communications provider "either currently providing or seeking to provide service on Tribal lands with the use of [USF] support."⁸ The Joint Commenters agree with USTelecom that such a broad application of the *Further Guidance* is not justified and should be revised.

This approach fails to take into account the substantial changes that the Commission has made to its funding mechanisms as part of its "transformation of the high-cost program"⁹ One of these changes involves the phase-down of support currently being received by competitive ETCs. This support has been frozen at the 2011 baseline,¹⁰ and is currently being phased out

⁸ *Further Guidance Public Notice*, 27 FCC Rcd at 8176 (para. 1).

⁹ *CAF Order*, 26 FCC Rcd at 17756 (para. 247). The Joint Commenters note that similar concerns have been raised regarding reporting requirements imposed on ETCs whose legacy support is being eliminated. Specifically, the Commission has been asked (1) to refrain from imposing any obligations to collect and file broadband data on ETCs not receiving CAF Phase II support; and (2) to limit the application of filing requirements for five-year service quality improvement plans and progress reports to ETCs receiving CAF Phase II support, while refraining from imposing these reporting requirements on ETCs (a) whose USF support is being eliminated; or (b) that only receive CAF Phase I support or Mobility Fund Phase II support. *See* Petition for Clarification and Reconsideration or, in the Alternative, Waiver of CTIA–The Wireless Association® and USTelecom, WC Docket No. 10-90 *et al.* (filed June 25, 2012) ("Joint CTIA-USTelecom Petition").

¹⁰ *CAF Order*, 26 FCC Rcd at 17832 (para. 519). The "baseline" for a particular competitive ETC is equal to the average monthly support it received in 2011, adjusted as necessary to prevent per-line support from exceeding \$250.

in 20 percent increments, beginning on July 1, 2012, with “no support beginning July 1, 2016.”¹¹ It is true that competitive ETCs will be eligible to participate in single-winner reverse auction mechanisms for purposes of attempting to receive Mobility Fund Phase I and Phase II support,¹² and that competitive ETCs also will be eligible to compete for funding reserved for the Tribal Mobility Fund.¹³ The fact remains, however, that many competitive ETCs currently receiving high-cost funding may receive substantially reduced levels of support, or may receive no support at all, pursuant to the Commission’s transformed USF funding mechanisms.

The likelihood that support levels will shift downward for many competitive ETCs is heightened by the fact that the overall budget established by the Commission for competitive ETCs is relatively small (\$500 million annually, compared to \$4 billion annually for price cap and rate-of-return carriers),¹⁴ and that reverse auctions may award support on a nationwide basis.¹⁵ If the Commission were to use this nationwide funding approach for Mobility Fund Phase

¹¹ *Id.* The phase-down will be temporarily halted, however, if Mobility Fund Phase II is not operational by June 30, 2014. *Id.*

¹² *See id.* at 17831-32 (para. 517) (explaining the relationship between the receipt of support under current mechanisms and the receipt of support from the Mobility Fund).

¹³ *See id.* at 17711 (para. 126), 17819-22 (paras. 481-488), 17825 (para. 497).

¹⁴ *Id.* at 17711 (para. 126).

¹⁵ Under this nationwide disbursement approach:

All bids, across all areas, would be compared against all other bids, and would be ordered from lowest-price-per-unit bid to highest. . . . Support would be allocated first to the bidder making the lowest (adjusted) per-unit bid, and then to bidders with the next lowest per-unit bids in turn, until the running sum of support funds for the winning bidders exhausted the money available

Federal-State Joint Board on Universal Service; Lifeline and Link-Up; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4649-50 (para. 286) (2011).

II,¹⁶ “it would virtually guarantee that areas with lower unit costs would receive the bulk of Mobility Fund Phase II support, while eligible service areas with higher unit costs would face the prospect of being frozen out of any Phase II funding.”¹⁷ Thus, carriers serving areas with higher costs would find it difficult to compete successfully for Mobility Fund support in a single-winner reverse auction.

Given these circumstances, the Joint Commenters strongly endorse USTelecom’s suggestion that Tribal engagement requirements specified in the *Further Guidance Public Notice* should “apply only to ETCs that receive *new* high-cost support to fund deployment on Tribal lands”¹⁸ While there may be a basis for applying Tribal engagement requirements in the case of ETCs that receive USF support targeted for the deployment of facilities on Tribal lands, the Joint Commenters agree that it does not make sense to impose these obligations on ETCs whose support is being eliminated, or on ETCs that do not receive any targeted funding for Tribal areas.¹⁹

The Commission has acknowledged that the imposition of new reporting and certification requirements is not warranted in the case of competitive ETCs whose support is being phased

¹⁶ The Bureaus have indicated that this method of selecting auction winners by comparing bids on a nationwide basis will be used to award Mobility Fund Phase I support. *Mobility Fund Phase I Auction Scheduled for September 27, 2012; Notice and Filing Requirements and Other Procedures for Auction 901*, AU Docket No. 12-15, Public Notice, 27 FCC Rcd 4725, 4764-65 (paras. 141-142) (WTB, WCB 2012).

¹⁷ U.S. Cellular Comments, WC Docket No. 10-90 *et al.* (filed Jan. 18, 2012), at 9.

¹⁸ Petition at 3-4 (emphasis added). The Joint Commenters note that JSI recently queried ONAP regarding the Tribal engagement obligations of competitive ETCs whose support is being phased down, and that ONAP “stated that they would get back to JSI with a response.” JSI Letter at 2. Given the extensive degree of uncertainty generated by the *Further Guidance Public Notice*, the Joint Commenters would welcome any informal clarification that ONAP may be in a position to provide, but the Joint Commenters stress that the priority should be to expedite action by the Commission on the Petition, on the USTelecom First Reconsideration Petition, and on the Joint CTIA-USTelecom Petition.

¹⁹ Petition at 4.

down. Specifically, the Commission concluded in the *CAF Order* that competitive ETCs must continue meeting existing reporting requirements, but “[c]ompetitive ETCs whose support is being phased down will not be required to submit any of the new information or certifications . . . related solely to the new broadband public interest obligations”²⁰

The new Tribal engagement obligations present the same case, and thus require the same treatment. The *CAF Order*, for the first time, “will require that, at a minimum, ETCs [must] demonstrate on an annual basis that they have meaningfully engaged Tribal governments in their supported areas.”²¹ Consistent with the approach taken in the *CAF Order*, these new Tribal engagement requirements should apply only to ETCs that receive new CAF or Mobility Fund support to fund network deployment on Tribal lands. The Joint Commenters agree with USTelecom’s explanation of the logic of this approach: The premise of the Tribal engagement requirements “is that ETCs will engage in meaningful discussions with Tribal communities regarding the [ETCs’] ‘deployment’ plans in those individual communities. Such discussions would be of no value if the ETC will not be receiving support for network deployments in a Tribal area.”²² The reduction in support to wireless ETCs will reduce or eliminate new cell site construction on Tribal lands as support is phased down.

Moreover, as USTelecom also explains, uncertainties faced by carriers regarding the future level of their CAF or Mobility Fund support would make it unrealistic, at least in the near term, to expect that discussions between the carriers and Tribal representatives could serve any practical purpose. USTelecom notes that “[c]ompetitive ETCs providing mobile wireless servic-

²⁰ *CAF Order*, 26 FCC Rcd at 17853 (para. 583) (emphasis added).

²¹ *Id.* at 17868 (para. 637) (footnote omitted).

²² Petition at 4 (footnotes omitted).

es . . . have no information on whether they will receive any support—let alone a specific amount—pursuant to either Phase I or Phase II of the Mobility Fund.”²³ The Joint Commenters agree with USTelecom that “these ETCs cannot accurately present to Tribal communities their deployment plans when they do not know whether and how much funding they will receive and in what areas, nor do they know whether they will choose to participate in the future funding programs whenever they come online.”²⁴

The Commission should rectify these problems generated by the *Further Guidance Public Notice* by invoking a simple but effective solution: apply the Tribal engagement obligations only prospectively, so that only ETCs that receive new high-cost support earmarked to fund deployment on Tribal lands are subject to the obligations promulgated in the *Further Guidance*.

III. RECONSIDERATION OF THE TRIBAL ENGAGEMENT REQUIREMENTS IS WARRANTED BECAUSE ONAP FAILED TO CONSIDER COMPLIANCE COSTS THAT WOULD RESULT FROM THE REQUIREMENTS.

The *Further Guidance Public Notice* must be reconsidered or clarified because it fails to examine the costs associated with the various ETC activities discussed by ONAP. The cumulative impact of these costs imposed on communications carriers would be substantial, and would likely compromise the achievement of the goals and objectives ONAP is seeking to promote. An effective way to address these problems would be for the Commission to decide that the ETC activities will be treated as aspirational goals and not mandatory engagement obligations.

²³ *Id.* at 4 n.8 (emphasis in original).

²⁴ *Id.*

A. Compliance with the Numerous Requirements Would Be Costly for Communications Carriers.

The Joint Commenters support the Commission’s efforts to utilize universal service funding “to accelerate mobile voice and broadband availability” on Tribal lands,²⁵ and also understand the importance of “ensur[ing] the effective exchange of information that will lead to a common understanding between Tribal governments and communications providers receiving USF support, on the deployment and improvement of communications services on Tribal lands.”²⁶ The Joint Commenters’ networks cover areas in numerous Tribal jurisdictions, and the Joint Commenters are committed to providing reliable and affordable mobile voice and broadband services to consumers residing in these jurisdictions.

Nonetheless, the Joint Commenters must agree with USTelecom that, to the extent the engagement obligations in the *Further Guidance Public Notice* are mandatory, the Commission has failed to balance the benefits of these obligations against the costs that they will impose, and has also lost sight of the Commission’s responsibility to reduce unneeded burdens on communications carriers.²⁷ For example, taken together, the Joint Commenters would be required by the provisions of the *Further Guidance* to consult with numerous separate Tribal governments, which would entail significant costs and expenditure of resources.²⁸

A review of some of the principal activities established in the *Further Guidance Public Notice* provides a sense of the burdens and costs they would impose on ETCs:

²⁵ *CAF Order*, 28 FCC Rcd at 17675 (para. 28).

²⁶ *Further Guidance Public Notice*, 27 FCC Rcd at 8176 (para. 2).

²⁷ *See* Petition at 11.

²⁸ U.S. Cellular, for example, provides service coverage in more than 20 separate Tribal jurisdictions.

■ The discourse necessary to comply with the Tribal engagement obligation “should be between decision-makers on both sides. . . . [T]his engagement cannot be merely between sales and marketing individuals on one side and administrative staff or advisors on the other.”²⁹

RESPONSE: The burdens imposed by this provision would be substantial, especially for carriers that operate in numerous Tribal jurisdictions. Providing for the attendance by a senior company executive (with decision-making authority) at “collaborative discussions and actual live conversation[s]”³⁰ would involve an expensive time commitment. The Joint Commenters agree with USTelecom that this provision “could literally require full-time attention from a senior leader and supporting team doing little else but traveling from Tribal community to Tribal community.”³¹

■ “On the Tribal government side, there are certain actions that should be taken to best prepare for this valuable engagement.”³² Tribal leaders should “recognize and act upon this opportunity to become organized, maintain continuity, and provide for certainty in conveying their communications needs and priorities.”³³

RESPONSE: The problem with this obligation, at least in the short term, is that it could compromise the ability of an ETC to submit to the Commission its annual certification and summary of its compliance with the Tribal government engagement obligation. The *Further*

²⁹ *Further Guidance Public Notice*, 27 FCC Rcd at 8179 (para. 10).

³⁰ *Id.* (para. 9) (footnote omitted). The Joint Commenters agree with USTelecom that ONAP appears to contemplate face-to-face engagements, with limited exceptions. Petition at 13 & n.38.

³¹ Petition at 13.

³² *Further Guidance Public Notice*, 27 FCC Rcd at 8179 (para. 11).

³³ *Id.* ONAP emphasizes that “[t]his engagement obligation necessitates a level of organization within the Tribal government that can convey both a high degree of certainty in the communications priorities of the Tribal Nation and maintain the continuity of those priorities to the greatest extent possible in a governmental environment that, by definition, changes over time.” *Id.* at 8180 (para. 12).

Guidance Public Notice indicates that this obligation must be satisfied by the end of this calendar year (and in each calendar year thereafter),³⁴ which means that ETCs now have less than 100 days to satisfy the engagement obligation, with respect to Tribal governments in each Tribal area in which they operate, or face “financial consequences, including potential reduction in universal service support”³⁵ The ability of a carrier to comply with this requirement—and thus avoid penalties—could be made difficult or impossible if a given Tribal government is not successful in achieving timely preparation for its engagement with the carrier.

■ Because the Tribal engagement obligation must be met by the end of each calendar year, ETCs “should . . . take immediate steps to establish a lead and/or a team within their companies and to identify the appropriate Tribal government leaders with whom they will initiate the engagement process.”³⁶

RESPONSE: This provision underscores the substantial logistical task confronting ETCs, especially those that serve numerous Tribal communities. The task of initiating the engagement process—let alone going through the process—is daunting. While it is true that ONAP gave notice of this and other expected carrier activities on July 19 (in the *Further Guidance Public Notice*), the fact remains that the Commission still has not acted on challenges to the Tribal engagement obligation, and numerous ambiguities in the *Further Guidance* have added more layers of complication to the tasks faced by carriers.

■ Communications carriers should retain copies of all communications with Tribal leaders that the carriers would need to show that they have complied with the annual certification re-

³⁴ *Id.* (para. 14). See JSI Letter at 2-3.

³⁵ *Further Guidance Public Notice*, 27 FCC Rcd at 8178 (para. 7).

³⁶ *Id.* at 8180 (para. 14).

quirement.³⁷ In order to avoid the imposition of any penalties by the Commission, a communications carrier must be able to demonstrate “repeated good faith efforts to meaningfully engage with the Tribal government.”³⁸

RESPONSE: These recordkeeping requirements—especially if multiplied by a factor of more than 20, for example³⁹—could add significantly to the cumulative aggregation of burdens. This level of burdens could have the effect of undermining the goals that ONAP and the Commission are attempting to achieve, by discouraging communications carriers from giving priority to any efforts to deploy their voice and broadband infrastructure in Tribal lands.

■ Communications carriers, in meeting with Tribal representatives, should be ready to discuss deployment priorities (including how the priorities were determined), initial deployment plans, services they intend to deploy on Tribal lands, and their timelines for the provision of service. The carriers also should identify opportunities to partner with Tribal governments.⁴⁰

In addition, communications carriers should be prepared to discuss relevant rights of way and other permitting and review processes (and “should have documentation of any and all processes with which they currently comply”⁴¹), to discuss relevant Tribal business and licensing requirements, and “to provide evidence of compliance with any Tribal business practice licenses with which they currently comply for that Tribe.”⁴²

³⁷ *Id.* (para. 15).

³⁸ *Id.*

³⁹ As the Joint Commenters have noted, U.S. Cellular’s designated service areas currently encompass the jurisdictions of more than 20 separate Tribal governments.

⁴⁰ *Further Guidance Public Notice*, 27 FCC Rcd at 8181 (para. 19).

⁴¹ *Id.* at 8183 (para. 27).

⁴² *Id.* (para. 29).

RESPONSE: It appears that communications carriers would be required to prepare separate presentations—covering deployment priorities, plans, and timelines, as well as issues relating to rights of way, permits, and business and licensing requirements—for each Tribal government having jurisdiction over Tribal lands located in the carriers’ designated service areas.⁴³ The Joint Commenters agree with USTelecom that these provisions of the *Further Guidelines Public Notice* would necessitate a significant commitment of resources by ETCs, and the level of this commitment would be magnified to the extent that an ETC serves numerous Tribal jurisdictions.⁴⁴ It is unreasonable to impose these substantial obligations without first having compared the benefits that would be gained and the costs that would be imposed by the obligations.

■ With respect to marketing services, Tribal governments and communications carriers “may wish to discuss” locating a retail presence within a Tribal community and employing members of that community, developing marketing materials specific to the Tribal community, and the engagement of the carriers’ customer service, technical assistance, and commercial business divisions.⁴⁵

RESPONSE: The *Further Guidance Public Notice* is not clear regarding whether any penalties could attach if an ETC does not explore with Tribal governments the prospect of constructing retail outlets on Tribal lands and employing residents of Tribal communities. Such an outcome would not be reasonable. As USTelecom explains, in order for any such discussions to be meaningful, ETCs would need to “conduct a market analysis of the economic feasibility of open-

⁴³ See Petition at 12.

⁴⁴ *Id.*

⁴⁵ *Further Guidance Public Notice*, 27 FCC Rcd at 8182-83 (para. 25).

ing a brick-and-mortar store in each Tribal land[,]” which unavoidably would be a costly undertaking.⁴⁶

B. The Commission Should Determine That ETC Activities Described in the *Further Guidance* Will Be Treated as Aspirational Goals and Not Binding Requirements.

The Joint Commenters share the Commission’s objective of ensuring the effective exchange of information, and of promoting substantive, meaningful, candid, and sincere dialogue, between Tribal governments and ETCs.⁴⁷ As ONAP properly recognizes, a necessary prerequisite for the advancement of this objective is a “genuineness of the intent on both sides.”⁴⁸

In the Joint Commenters’ view, the nature of this objective is such that it cannot realistically be advanced by the imposition of “‘check the box’ requirement[s]”⁴⁹ or any other obligations on ETCs. Moreover, treating the multifarious ETC activities delineated in the *Further Guidance Public Notice* as requirements overshoot the mark, in light of the fact that, “[i]n many places, [ONAP] expect[s] that [currently] there are good and productive relationships between communications providers and Tribal Nations.”⁵⁰

A more productive way to stimulate the “genuineness of intent” needed to achieve productive engagements between Tribal governments and communications carriers would be to promote “flexible, voluntary engagement efforts”⁵¹ and to develop guidance regarding the most effective means of advancing these efforts. Tribal governments and ETCs receiving support tar-

⁴⁶ Petition at 13.

⁴⁷ *Further Guidance Public Notice*, 27 FCC Rcd at 8176-77 (paras. 2-4).

⁴⁸ *Id.* at 8177 (para. 3).

⁴⁹ *Id.*

⁵⁰ *Id.* See Petition at 11.

⁵¹ Petition at 11.

geted for the provision of service on Tribal lands have a common objective: determining and implementing the most efficient ways to deploy voice and broadband networks capable of bringing affordable services to the largest number of consumers residing on Tribal lands. The Commission’s establishment of aspirational goals and its provision of effective guidance for meeting those goals are the best way to assist Tribal governments and ETCs in pursuing this objective.

The Joint Commenters agree with USTelecom that “[w]hether [the] activities [specified in the *Further Guidance Public Notice*] are binding rules or aspirational goals is unclear.”⁵² The Joint Commenters therefore suggest that the Commission should clarify that these ETC activities are aspirational goals, and that the *Further Guidance* (together with best practices that ONAP will develop)⁵³ is intended to point the way toward achieving these goals.

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⁵² *Id.* at 7 (footnote omitted).

⁵³ See *Further Guidance Public Notice*, 27 FCC Rcd at 8177 (para. 5).

IV. CONCLUSION.

For the foregoing reasons, the Joint Commenters respectfully urge the Commission to grant the Petition for Reconsideration and Clarification filed by USTelecom.

Respectfully submitted,



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